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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Amendment to the Commission's	)	WT Docket No. 95-157
Rules Regarding a Plan for Sharing	)	
The Costs of Microwave Relocation	)	

To: The Commission

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REPLY COMMENTS OF THE
ASSOCIATION OF AMERICAN RAILROADS

The Association of American Railroads (AAR), by its undersigned counsel and pursuant to Section 1.405 of the Rules of the Federal Communications Commission (Commission), hereby replies to comments filed in response to the Commission's Notice of Proposed Rule Making (NPRM) in the above-referenced proceeding.

The vast majority of commenting parties supported the Commission's proposal that PCS licensees share the costs of microwave relocation. The fixed microwave licensees and PCS proponents alike agreed that cost-sharing was an equitable solution to the "free-rider" problem and would accelerate the relocation process.[1/] Aside from that issue, the views of the fixed microwave licensees and the PCS proponents diverged sharply. The fixed microwave licensees uniformly seek to keep in place the relocation protections that the Commission adopted three years ago. The PCS proponents, on the other hand, are seeking

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1/ See, e.g., Comments of AAR (filed November 30, 1995) at 1-2, Comments of Interstate Natural Gas Association of America (INGAA) (filed November 30, 1995) at 2, Comments of National Rural Electric Cooperative Association (filed November 30, 1995) at 5, Comments of Williams Wireless, Inc. (filed November 30, 1995) at 2.

to rewrite these rules, thereby depriving the fixed microwave licensees of those protections and undermining the carefully crafted compromise developed such a short time ago.

I. The Commission Should Reject the PCS Proponents' Efforts to Eliminate or Reduce the Voluntary Negotiation Period

Although the NPRM did not address the two year voluntary negotiation period contained in the FCC's Rules, a large number of PCS licensees and applicants have urged the Commission in their comments to either eliminate the voluntary negotiation period or reduce its duration,[2/] claiming that the fixed microwave licensees are abusing the negotiation process and delaying the introduction of PCS. These claims are without merit and should not impel the Commission to reopen the issue of the voluntary negotiation period.

The basis of the PCS proponents' argument appears to be that they should not be required to delay recoupment of the large sums of money they spent in spectrum auctions. But this argument ignores the important fact that when they made their bids, they were fully on notice that the voluntary negotiation period was part and parcel of the relocation rules and doubtless factored this information into their bidding and build-out strategies. Rather than being victims of unreasonable demands by fixed microwave users by trying to change the rules in the middle of the game. Only eight months have passed since the commencement of the voluntary negotiation period

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2/ Comments of PCIA (filed November 30, 1995) at 12-15; Comments of PCS Primeco (filed November 30, 1995) at 6; Comments of Sprint Telecommunications Venture (filed November 30, 1995) at 17.

for the A and B block licensees. In fact, many PCS licensees have not yet contacted fixed microwave licensees regarding relocation. There is simply insufficient evidence of abuse to justify any change in the voluntary negotiation period.

The railroads have been acting in good faith reliance on the rules crafted by the Commission. These rules reflect the Commission's goals, stated at the outset of this proceeding, that displaced fixed microwave users would not have to bear the economic burden of relocation and that their operations would not be disrupted. In this context, AAR wholeheartedly agrees with the comments that urge the Commission to avoid any actions that would upset the balance of relocation negotiations.[3/] AAR understands that negotiations between PCS licensees and member railroads for relocation are proceeding in an orderly and business-like fashion free from any allegations of bad faith. The current rules must be given an opportunity to work.

II. The Definition of Comparability Must be Sufficiently Flexible to Include Total System Capacity, Serviceability and to Allow Replacement with Digital Equipment

The Commission proposed to evaluate comparability according to three key indicators -- communications throughput, system reliability and operating cost.[4/] AAR agrees with the comments of Valero Transmission, L.P. (Valero) and the American Petroleum Institute (API) that communications throughput should be based on the total capacity of a system, rather

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3/ See INGAA at 2, Comments of Tenneco (filed November 30, 1995) at 2-3.

4/ NPRM at ¶ 73.

than the capacity actually in use.[5/] Most systems build in some spare capacity in order to accommodate future expansion, system growth and alternate routing capabilities. Railroad fixed microwave systems are designed and engineered with such future needs in mind. If throughput does not encompass total capacity, a fixed microwave licensee could be forced to accept a lower capacity system than the one being replaced and could, therefore, find itself restricted to a system that does not meet its needs. Such a system is, by definition, not a comparable system.

In terms of system reliability, the Commission proposed that a system designer should not be required "to build the radio link portion of a system to a higher reliability than that of the other components of the system."[6/] Many fixed microwave licensees, including AAR, strongly opposed this proposal, stating that it would lower the overall reliability of the new system and, therefore, would not promote comparability.[7/] UTC explained that "[i]n determining comparability, reliability of the radio links is one of the most critical factors. In no instance should a licensee have to accept individual replacement components that are not equal to or superior than the existing individual components."[8/] For the railroads,

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5/ Comments of Valero Transmission, L.P (filed November 30, 1995) at 21, Comments of API (filed November 30, 1995) at 13.

6/ As an example, the Commission stated that, "if an incumbent system had a radio link reliability of 99.9999 percent, but an overall reliability of only 99.999 percent because of limited battery back-up power, we would only require that the new system have a radio link reliability of 99.999 percent to be considered comparable. NPRM at n.126.

7/ Comments of UTC, The Telecommunications Association (UTC) (filed November 30, 1995) at 22; Comments of Cox and Smith (filed November 30, 1995) at 3; Comments of Southern California Gas (filed November 30, 1995) at 14-15.

8/ UTC at 22.

extremely reliable radio systems are critical because of the safety component of railroad radio communications. To compromise the quality of these links could endanger safety along the railroad right-of-way.

AAR also supports API's suggestion that a fourth factor -- serviceability -- should enter the comparability analysis, i.e., in the event of a system malfunction, access to those components essential to restoration of service must be equal to or greater than access to comparable components of the existing system.[9/] The addition of the serviceability factor will contribute to a more complete and accurate comparability analysis.

The comments also revealed widespread concern among the fixed microwave licensees that their systems would be replaced with out-of-date analog equipment. AAR fully agrees with INGAA that, "[i]t makes little sense to replace existing systems with what almost everyone would agree is antiquated and short-lived technology."[10/] The Association of Public-Safety Communications Officials-International (APCO) correctly pointed out that because of the proliferation of digital technology, a displaced fixed microwave user may be endangering the long-term reliability of its communications system if it is forced to install a new analog system at this time.[11/] The insistence of the PCS industry that displaced fixed microwave users content themselves with analog replacement systems demonstrates a blatant double standard. The PCS industry is staking its future on digital transmission to gain market share against cellular operators, yet it wants to restrict the displaced fixed microwave

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9/ API at 14.

10/ INGAA at 2.

11/ APCO at 6.

users with what it claims is obsolescent technology because it is less expensive. The Commission should refrain from propounding any rule or clarification that would deny displaced fixed microwave users the opportunity to replace their current systems with digital equipment.

III. The Proposal To Downgrade Incumbents To Secondary Status On April 4, 2005 Is Completely At Odds With The Assurances Given To The Incumbents By The Commission

The fixed microwave licensees unanimously and vehemently opposed the Commission's proposal to downgrade all incumbents to secondary status on April 4, 2005. INGAA warned that this proposal could actually act as a disincentive towards PCS licensees making any offer for relocation in rural or underutilized areas.[12/] This point of view was echoed by Williams Wireless, Inc., which argued that the result of the proposal would be to force rural fixed microwave users out of the 2 GHz band without compensation.[13/]

Far from representing a clarification of the relocation rules, the Commission's adoption of this proposal would represent a serious and dramatic reversal of the policies and goals underpinning the relocation rules. Because PCS deployment in rural areas may not take place for years, this proposal, if adopted, would inevitably mean that some displaced fixed microwave operators would have to shoulder the burden of their own relocation. Such a result runs contrary to the fundamental premise underpinning the Commission's relocation rules: it is not fair or just to require displaced fixed microwave users to bear the burden of

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12/ INGAA at 4.

13/ Williams Wireless, Inc. at 6. See, also Valero at 5, API at 19, UTC at 31.

their own displacement. The discrimination against rural interests embodied in this proposal cannot be justified.

IV. A Cap On Cost-Sharing Among PCS Licensees Will Have A Direct And Adverse Impact On Relocation Negotiations Between PCS Licensees And Microwave Incumbents

Almost all fixed microwave users, including AAR, voiced their opposition to the Commission's proposed $250,000 (plus $150,000 if construction of a tower is required) cap on reimbursement of relocation costs.[14/] These parties expressed the legitimate concern that such a cap would have a chilling effect on negotiations. As UTC stated, "PCS licensees will be mindful of this cap during negotiations and will hesitate to pay relocation costs that exceed the cap since they will not be reimbursed for these amounts."[15/] UTC added that the cap will fall particularly hard on those fixed microwave users with complex systems or with systems in unique locations.[16/]

GTE Service Corporation (GTE), a PCS licensee, provided support for these comments when it stated its belief that a "reimbursement cap may make some licensees reluctant to negotiate relocation in situations where other licensees would benefit."[17/] GTE also pointed out that a reimbursement cap is not necessary to make costs more certain

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14/ INGAA at 4, National Rural Electric Cooperative Association at 5, Southern California Gas at 4, Comments of American Gas Association (filed November 30, 1995) at 4.

15/ UTC at 12.

16/ Id.

17/ Comments of GTE (filed November 30, 1995) at 15.

because licensees have "ample relocation cost information."[18/] GTE's comments serve as powerful confirmation of the fixed microwave users' concern that a reimbursement cap will actually discourage systemwide replacement. The Commission should avoid any measures which would discourage, either directly or indirectly, systemwide replacement. Not only would displaced fixed microwave users benefit from systemwide relocation, but PCS licensees will benefit because systemwide relocations are more cost-efficient.

V. Attorneys' And Consultants' Fees Must Fall Within The Category Of Reimbursable Costs

The Commission's proposal to exclude fees for attorneys and consultants from the reimbursable costs of providing comparable facilities prompted expressions of serious concern in the microwave licensee community. Given the technical and regulatory complexities of the relocation process, engineering and legal consultants are indispensable. The PCS licensees are availing themselves of such resources. To deprive the displaced fixed microwave users of similar resources would unfairly penalize them and cripple their ability to engage in meaningful negotiations.[19/] A PCS relocator's ability to exercise "veto power" over a fixed microwave operator's use of attorneys and consultants would result in a serious imbalance of bargaining power and would unfairly burden the displaced fixed microwave users with the costs of a process they did not initiate or request. Such fees are a reasonable cost of the relocation process and should be subject to reimbursement. It would be arbitrary and capricious to exclude them from reimbursable costs.

18/ Id.

19/ Cox and Smith at 3; Williams Wireless, Inc. at 4; Comments of Santee Cooper (filed November 30, 1995) at 2; API at 15; UTC at 24-25; Southern California Gas at 2.

Conclusion

For these reasons, AAR urges the Commission to refrain from adopting policies and rules for the relocation plan that will change the rules in the middle of the negotiations, tipping the balance in favor of the PCS industry and promoting inadequate, piecemeal relocation offers from PCS licensees. Specifically, AAR requests the Commission: (1) to reject the proposals of the PCS proponents to eliminate or limit the duration of the voluntary negotiation period; (2) to abandon the proposal to downgrade all fixed microwave users to secondary status on a date certain; (3) to adopt a definition of comparability that guarantees a displaced fixed microwave user will not be forced to accept a lower capacity system and that encourages replacement with digital technology; (4) to guarantee that fees for attorneys and consultants fall within the category of reimbursable costs; and (5) to adopt reimbursement rules that reflect the complete and actual costs of relocation without reference to arbitrary caps.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Bridget Y. Monroe, a secretary with the law firm of Verner, Liipfert, Bernhard, McPherson and Hand, hereby certify that on this 16th day of January, 1996, a copy of Reply Comments of the Association of American Railroads was mailed, first class postage prepaid to the following:

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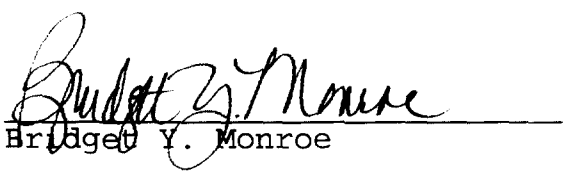

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